

ARMANDO FERNANDEZ,
COACHELLA VALLEY COLLECTION SERVICE

IBLA 2001-256

Decided February 23, 2005

Appeal from a decision of the Field Manager, Palm Springs-South Coast (California) Field Office, Bureau of Land Management, establishing a key loan policy for private landowners with property that cannot be accessed by motorized vehicle other than by crossing the public land portions of Dunn Road.

Appeal dismissed in part; decision affirmed.

1. Rules of Practice: Appeals: Mootness

When events occurring subsequent to the filing of an appeal preclude the Board from granting appellant any relief as to certain issues raised in the appeal, the appeal is properly dismissed as moot as to those issues.

2. National Environmental Policy Act of 1969:
Environmental Statements--National Environmental
Policy Act of 1969: Finding of No Significant
Impact--Public Lands: Generally

A party challenging a finding of no significant impact based on an environmental assessment has the burden of showing an error of law, error of material fact, or that the environmental analysis failed to consider a substantial environmental question of material significance to the proposed action.

APPEARANCES: Stephen M. Miles, Esq., Orange, California, for appellants Armando Fernandez and Coachella Valley Collection Service; James G. McKenna, Field Manager, Palm Springs-South Coast Field Office, for the Bureau of Land Management; Terry Kilpatrick, Esq., and D. Wayne Brechtel, Esq., Solana Beach, California, for intervenor Sierra Club.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Armando Fernandez and Coachella Valley Collection Service (hereinafter CVCS), have appealed from a March 28, 2001, decision of the Field Manager, Palm Springs-South Coast (California) Field Office, Bureau of Land Management (BLM), regarding appellants' access across public land segments of Dunn Road near Palm Springs, California.^{1/} Citing earlier BLM decisions to limit motorized vehicle access across the public land portions of Dunn Road, the Field Manager restricted motorized vehicle access to governmental agencies with emergency services or land management responsibilities and to private landowners (including appellants) whose lands cannot be accessed by motorized vehicle other than by the public land portions of Dunn Road. In particular, BLM limited the frequency of access by private landowners and denied appellants' request for keys to the locks on BLM-managed gates across the road, providing appellants instead with access through a key checkout process.^{2/} A petition for a stay of the decision was denied by the Board on June 5, 2001. In addition, the Sierra Club sought and was granted intervenor status by order dated July 13, 2001.

Dunn Road was constructed by Michael Dunn^{3/} beginning in 1966 "in stages northward from the San Bernardino National Forest towards Palm Springs, crossing both private and public lands." Environmental Assessment (EA) CA-660-00-35 at 3 (BLM Answer, Ex. 10). There was no road access to this area previously and it appears that the road was constructed to facilitate Dunn's plan to subdivide scattered tracts of land in the vicinity of the road. (BLM Memorandum of Aug. 27, 1999, to the Regional Solicitor, BLM Answer, Ex. 3 at 1.) No authorization was obtained from BLM for use of the public lands to construct the road. *Id.* In an effort to resolve this trespass, suit was filed in the Federal district court and defendants were initially enjoined from traversing or using the surface of the road constructed across public lands. See United States v. American Land Co., Civ. No. 68-1119-FW, slip op. at 2 (C.D. Cal. June 17, 1975) (Reprinted in BLM Answer at Ex. 1). In the final judgment entered in 1975, the court found that Dunn did not hold an easement by way of

^{1/} Chuparosa, Inc., also appealed a similar decision it received emanating from the same management action. Although that case was docketed separately as IBLA 2001-257, it was consolidated with the instant appeal for review. Chuparosa's appeal was withdrawn by its successor-in-interest and, hence, dismissed on July 23, 2003.

^{2/} This same key checkout access procedure was invoked by BLM for other similarly situated private landowners.

^{3/} It appears that Michael Dunn did business under the name of American Land Company (AMLANCO).

necessity across public lands at any time and AMLANCO renounced any claim to an easement by necessity. Id. at 3. The prior injunction was modified and AMLANCO was authorized to proceed with construction of the road upon the alignment specified in the Palm Hills General Plan of the City of Palm Springs subject to certain conditions. Id. Among the conditions was the obligation to obtain BLM approval prior to improving or reconstructing any portion of the road on public lands and to comply with any stipulations required by BLM pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 through 4370 (2000). United States v. American Land Co., slip op. at 5. Another condition obligated AMLANCO to prevent unauthorized use of, or entrance upon, any portions of the road prior to acceptance of the dedication of the road by the City of Palm Springs. Id. at 9. Accordingly, AMLANCO assumed the responsibility for maintaining locked gates on the road and issuing keys to property owners, thereby controlling access to the affected public lands. See AMLANCO letter of Feb. 13, 2001 (Intervenor's Answer at Ex. O.)

Use of Dunn Road by motorized vehicles has become an increasingly difficult issue since the 1975 final judgment. On March 18, 1998, the U.S. Fish and Wildlife Service (FWS) declared the bighorn sheep occupying the Peninsular Ranges of southern California to be an endangered species and thus raised new concerns regarding the subject road. 63 FR 13134 (Intervenor's Answer at Ex. F). In a FWS study, it was determined that off-road vehicle (ORV) use will affect the behavior of bighorn sheep. FWS, Biological Opinion on Desert Adventures Jeep Eco-Tours (I-6-98-F-14, July 27, 1999), quoted in EA CA-660-00-35 (BLM Answer, Ex. 10) at 2. Subsequently, suit was filed against BLM challenging the adequacy of its actions under the Endangered Species Act, 16 U.S.C. §§ 1531-1534 (2000), in terms of protection of the endangered Peninsular bighorn sheep. Center for Biological Diversity v. BLM, Civ. No. C-00-0927 WHA (N.D. Cal., filed Mar. 16, 2000).

Thereafter, by Decision Record dated August 3, 2000 (BLM Answer at Ex. 11), the Field Manager, explaining BLM's obligation to manage certain public lands for conservation of the endangered Peninsular Ranges bighorn sheep, approved a temporary limitation on motorized vehicle use of the public land portions of Dunn Road ^{4/} in accordance with the California Desert Conservation Area Plan (CDCA

^{4/} In November 1997, BLM acquired a 244-acre parcel in sec. 5, T. 5 S., R. 5 E., SBM, that contained two of the gates that control access to Dunn Road. (EA CA-660-00-35 at 3.) The public land portions of Dunn Road, a.k.a. Palm Hills Drive, subject to the temporary closure occur within E½ sec. 5, W½ sec. 8, secs. 16, 29, 32, and 33, T. 5 S., R. 5 E., and secs. 4, 8, 9, and N½ sec. 16, T. 6 S., R. 5 E., SBM. Id. at 4.

Plan)^{5/} pending further actions for recovery of the bighorn sheep population to be determined under the Coachella Valley Multiple Species Habitat and Natural Communities Conservation Plan (CV Plan).^{6/} The decision was issued with a finding of no significant impact (FONSI) based upon EA CA-660-00-35. Notice of the temporary closure was published in the Federal Register on August 28, 2000, at 65 FR 52126. That decision was not appealed.

The initial temporary closure decision was followed by an August 4, 2000, BLM letter to those private landowners holding keys to the existing gate locks securing access to Dunn Road, explaining that the locks would be changed and they would need to submit a request for new keys. Subsequently, on March 1, 2001, BLM entered into a stipulated settlement of the litigation regarding protection of the Peninsular Ranges bighorn sheep. (BLM Answer at Ex. 25.) This stipulation included the provisions later incorporated in the BLM decision under appeal regarding BLM locks on gates on Dunn Road and restrictions on access by private property owners to the terms specified in the BLM decision under appeal. *Id.* at 7-10. The stipulated settlement was subsequently approved by the court in an “Order Approving Final Consent Decrees Re Bighorn Sheep and Re All Further Injunctive Relief.” Center for Biological Diversity v. BLM, Civ. No. C-00-0927 WHA (N.D. Calif. Mar. 20, 2001) (Reprinted in BLM Answer at Ex. 26.) Accordingly, BLM prepared a supplement to its EA to assess the impacts of the proposed action modifying administration of Dunn Road to be consistent with the Consent Decree. (Supplement to EA CA-660-00-35, BLM Answer at Ex. 27.) BLM then issued the subject decision which denied all requests for keys to Dunn Road gates and established the process for acquiring access to Dunn Road.

In its Statement of Reasons (SOR) for appeal, CVCS indicates that at the time of the BLM decision it was the owner of property “solely accessible by way of Dunn Road.” (SOR at 1.) The property consisted of two parcels: the W $\frac{1}{2}$ of sec. 5, T. 5 S., R. 5 E., and the NW $\frac{1}{4}$ of sec. 3, T. 6 S., R. 5 E., SBM (326.93 and 156.62 acres, respectively).^{7/} It appears that CVCS had previously expressed an interest in selling

^{5/} The California Desert Conservation Area was created by Congress in 1976, 43 U.S.C. § 1781(3) (2000), and BLM was charged with creating a long-range management plan.

^{6/} At the time, Desert Adventures Jeep Eco-Tours, holder of a special recreation permit which expired on June 30, 2001, was the only party expressly authorized to use the public land portions of Dunn Road. (EA CA-660-00-35 at 4.)

^{7/} Appellant identifies both parcels collectively as “the CVCS Property” and states
(continued...)

its property to BLM, which had stated an interest in acquiring the parcel comprising the W¹/₂ of sec. 5 subject to appraisal of the fair market value. (BLM Answer at 13 and Ex. 4.) An appraisal made by David Yerke and submitted by CVCS, which found the fair market value to be \$1.825 million, proved unacceptable to BLM^{8/} which required a new appraisal by Warren Neville. (BLM Answer at 14 and Ex. 9.) Based on the Neville appraisal which found the fair market value of the property to be \$980,000, BLM offered to purchase the land for that price, but the sale was never consummated^{9/} as CVCS elected instead to sell the property to a third party on July 11, 2001 (after the appeal of the BLM decision regarding access) for \$1.2 million. (BLM Answer at 14-15; SOR at 1.) Despite the sale, appellants assert a continuing interest in this appeal based on “its interest in all AMLANCO assets including Dunn Road and its associated 1975 Judgment lien^{ed} by CVCS.” Id.

Appellants assert that the 1975 judgment granted AMLANCO the right to access and use Dunn Road, that the closure order violates the terms of this judgment, and that BLM is bound by the judgment. Id. at 5. An ownership interest in the road itself is claimed by CVCS based on AMLANCO’s rights under the 1975 judgment. Id. at 12. In this regard, appellants contend the road closure resulted in an unconstitutional taking of the property of AMLANCO and CVCS. Id. at 2. In addition, appellants contend the road closure forced the sale of the CVCS property at below market value in violation of appraisal standards and Federal acquisition law. Id. CVCS requests the Board to review the propriety of the BLM appraisal of the property they later sold and “remedy the appraisal process that has resulted in damages to CVCS.” Id. at 2.

^{7/} (...continued)

that it has, since initiating this appeal, sold the CVCS Property. (SOR at 1.)

^{8/} The parcel was apparently acquired by CVCS for the sum of \$809.48 at a Sheriff’s sale pursuant to a writ of execution against property of a judgment debtor. (BLM Answer at Ex. 2.)

^{9/} Apparently appellants initially accepted the BLM offer “under protest,” prior to obtaining a higher offer. (BLM Answer at 14-15.)

Appellants also contend that closure of the road violates R.S. 2477^{10/} regarding rights-of-way for roads constructed upon the public lands. (SOR at 12-14.) Closure of the road is also claimed to be contrary to access provisions of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 16 U.S.C. § 3210(b) (2000), regarding provision of access to non-federally owned land surrounded by public lands. *Id.* at 14-15. Appellants also suggest they are entitled to an easement by necessity for access. *Id.* at 15-16. Finally, appellants challenge the adequacy of the BLM analysis of the action under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2000). *Id.* at 17-19.

[1] With regard to appellants' challenge to the BLM appraisal of their property and BLM compliance with relevant law in making an offer for appellants' property, we find that appellants have, subsequent to filing this appeal, rejected the potential sale and sold the property to a third party for a higher price. For this reason the transaction can no longer be consummated and there is no relief which this Board can grant appellants. It is well established as a general rule that when events occurring subsequent to the filing of an appeal have deprived the Board of any ability to provide effective relief, the appeal is properly dismissed as moot. *E.g., Southern Utah Wilderness Alliance*, 151 IBLA 237, 240 (1999). Thus, on appeal from denial of a protest of inclusion of a parcel of public lands in an exchange, the appeal was dismissed as moot when it became apparent the protested parcel had been conveyed pursuant to the exchange subsequent to the appeal, depriving the Board of jurisdiction to strike the protested parcel from the exchange since judicial action is required to set aside a patent. *Michael W. McLucas*, 154 IBLA 42, 45-46 (2000). Similarly, an appeal from a decision approving a right-of-way application was dismissed as moot when, as a result of a withdrawal of the application filed after the appeal was filed, there was no effective relief which the Board could grant. *The Sierra Club*, 104 IBLA 17, 19 (1988). These precedents are applicable to the present case. Accordingly, the appeals are dismissed as moot regarding the challenge to the sufficiency of the BLM appraisal or the land acquisition procedures used by BLM. To the extent appellants have asserted a claim for damages arising from the appraisal process and the abandoned sale transaction, we note that any claim for compensation or damages is beyond the jurisdiction of this Board. *George H. Ruth*, 121 IBLA 31, 36 (1991) ("Awards of compensation in the form of monetary damages for breach of contract or other potentially actionable conduct are beyond the scope of the

^{10/} Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253 (formerly codified at 43 U.S.C. § 932 (1970)), repealed by Federal Land Policy and Management Act of 1976, Pub L. No. 94-579, § 706(a), 90 Stat. 2793. This statute provided that: "The right of way for the construction of highways over the public lands, not reserved for public uses, is granted."

jurisdiction delegated to the Board.”); see Exxon Corp., 95 IBLA 374 (1987). Accordingly, the appeal is dismissed with respect to such claims for relief.

Appellants contend that, as the successor in interest to AMLANCO, they have an ownership interest in the road and the right to access and use the road pursuant to the 1975 judgment, asserting that the closure of the road violates the terms of the judgment. Assuming, arguendo, that appellants are successors-in-interest to AMLANCO, we find that their right to enter upon the public land portions of the road under the judgment was limited by certain conditions. Among these is the obligation to submit to BLM in advance of any road work “design maps and engineering data showing the location and design of the roadways together with any environmental reports on the disruption of * * * any wildlife and archeological or other tangible or intangible values which may be disrupted as a result of the road construction.” United States v. American Land Co., slip op. at 5, ¶ 8(C). Further, the judgment provides that, as a “condition precedent” to any road work, AMLANCO is obligated to “comply with any stipulations” required by BLM under NEPA. Id. at 5, ¶ 8(D). Thus, any rights which appellants may have in the road are clearly subject to environmental limitations. We find no basis for a claim of ownership of the road. While AMLANCO is obligated to prevent unauthorized use or access to the road prior to any dedication and acceptance of the road by the City of Palm Springs, id. at 9, ¶ 8(N), this duty does not translate to a property interest in public land segments of the road which might be violated by the closure order.

Regarding the existence of an R.S. 2477 right-of-way, we recognize that under R.S. 2477 either action by a public authority or continued use of a road by the public over a period of time may result in the dedication of a road as a public highway by operation of law. Erik and Tina Barnes, 151 IBLA 128, 132 (1999); see Ball v. Stephens, 158 P.2d 207, 209 (Cal. Dist. Ct. App. 1945). In this case, Dunn Road was constructed by Michael Dunn to facilitate his plan to subdivide private tracts of land in the vicinity of the road. Access to the road has been restricted by locked gates requiring the use of keys since at least the 1975 judgment. The facts that this road was constructed by one party, that this construction was the subject of a legal action to enjoin this activity, and that subsequent access was restricted are inconsistent with dedication of the road as a public highway as a result of public use. Although the 1975 judgment provided the potential for construction of the road on certain conditions with the dedication of the road to (and acceptance of the dedication by) the City of Palm Springs, this has not happened. (BLM Answer at 4.) Accordingly, we are unable to sustain appellants’ contention that BLM improperly ignored the existence of an R.S. 2477 right-of-way when issuing its decision.

Appellants also assert that section 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (2000), applies to all public lands under BLM management and serves to preserve a reasonable access to private property across public lands. However, the right to access private lands surrounded by public lands is defined by that access which “the Secretary deems adequate.” 16 U.S.C. § 3210(b) (2000). Moreover, such right is not absolute as the landowner must “comply with rules and regulations applicable to access across public lands.” *Id.* Thus, an applicant seeking access under this ANILCA provision must first file a right-of-way application with BLM to provide BLM with an opportunity to adjudicate the ANILCA claim. Appellants have not sought such access from the Department. Thus, the closure decision did not adjudicate appellants’ rights or adversely affect appellants in this regard. Hence, an appeal on this issue is properly dismissed as premature. See Seldovia Native Association, 161 IBLA 279, 286-87 (2004). ^{11/}

Finally, we review appellants’ argument that the decision and the supplemental EA in support thereof violate NEPA. In the SOR, appellants assert that BLM’s “several environmental assessments concerning Dunn road are a piecemeal approach to assessing the significant impact to the human environment caused by the road closures.” (SOR at 17-18.) They further contend that the baseline and cumulative impacts analyses are flawed and an environmental impact statement (EIS) should be prepared. *Id.* at 19. It is necessary to keep in mind there were two environmental reviews conducted by BLM relative to Dunn Road closure: EA CA-660-00-35, addressing the temporary closure of the public land portions of Dunn Road, and Supplemental EA CA-660-00-35, addressing the administration of that temporary closure. As noted, appellant did not appeal from the findings in EA CA-660-00-35 and the resulting decision and FONSI issued on August 3, 2000. ^{12/} When

^{11/} To the extent appellants assert an easement by necessity across the public lands, we find this issue was resolved in the negative in litigation with appellants’ predecessor-in-interest. (1975 Judgment, BLM Answer, Ex. 1 at 3.) Appellants assert they are the successors-in-interest to AMLANCO and, accordingly, are bound by this ruling.

^{12/} In its Answer, BLM notes that a copy of the EA was mailed to appellants. Intervenor argues appellants’ failure to timely appeal the Aug. 3, 2000, road closure decision precludes them from challenging the closure in this appeal. Appellants indicate, however, they did not appeal the initial road closure decision because they were “informed and believed that the status quo would be maintained, i.e., keys would be issued to those parties that possessed keys for vehicular access in the past.” (SOR at 18.) In these circumstances, the manner in which the closure is

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that EA and decision were prepared, the key-loan/checkout program was not considered. Hence, the supplemental EA was prepared in response to consider the impacts of access limitations found in the stipulated settlement approved by the consent decree in Center for Biological Diversity, *supra* (Order of Mar. 20, 2001).

[2] Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2000), requires preparation of an EIS for “major Federal actions significantly affecting the quality of the human environment.” Hence, BLM is obligated to develop a reviewable record reflecting consideration of all relevant factors in making its threshold determination as to the significance of a proposed action. When BLM has conducted an environmental assessment and issued a FONSI, that determination “will generally be affirmed if BLM has taken a ‘hard look’ at the proposed action, identified relevant areas of environmental concern, and made a convincing case that the environmental impacts are insignificant or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures.” Great Basin Mine Watch, 159 IBLA 324, 352-53 (2003); Southern Utah Wilderness Alliance, 159 IBLA 220, 234-35 (2003). A party challenging BLM’s decision has the burden of demonstrating with objective proof that the decision is premised on an error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Great Basin Mine Watch, 159 IBLA at 353; Southern Utah Wilderness Alliance, 158 IBLA 212, 219-20 (2003). Mere differences of opinion provide no basis for reversal. Rocky Mountain Trials Association, 156 IBLA 64, 71 (2001).

In this case, appellants claim BLM’s scope of environmental review was a post-hoc rationalization of the provisions agreed to in the stipulated settlement and the FONSI determination was based on an inadequate analysis of recreational impacts. (SOR at 17-19.) As noted, an EA was prepared in April 2000 to consider the impacts of closing Dunn Road. The conclusion of EA CA-660-00-35 was that BLM’s decision to close Dunn Road would not have an adverse impact on any critical environmental resource. *See* EA at 12. Therein, BLM analyzed the impacts to various aspects of the environment, including recreation. *Id.* at 13-14. Subsequently, BLM proceeded to prepare a supplement to the EA when it determined “there was a need to analyze changes in the administration of the BLM Closure Order affecting Dunn Road access.” (Supp. EA (BLM Answer, Ex. 27) at 4.) Thus, this Supplemental EA, issued March 21, 2001, addressed only the administration of the temporary closure in response to the consent decree in Center for Biological Diversity. Contrary to

^{12/} (...continued)

implemented becomes an inextricable part of the decision and we decline to simply dismiss the challenge to the road closure.

appellants' assertion, the Supplemental EA includes an analysis of Dunn Road usage based on observation and historical data. (Supp. EA at 5.) Impacts to landowner access and to recreational opportunities are analyzed. *Id.* at 8-9. Appellants have not cited evidence to indicate that BLM's analysis of recreational impacts or impacts to landowner access overlooked a potentially significant impact which would invalidate the FONSI and require preparation of an EIS.

Appellants' claim that BLM failed to adequately analyze cumulative impacts also lacks merit. A brief analysis of cumulative impacts was provided in the EA for the road closure. (EA CA-660-00-35 at 15.) The Supplemental EA, at 10, also presents a brief cumulative impacts analysis. In this context, the burden is upon appellants to demonstrate that the analysis was insufficient. Appellants provide no explanation for their criticism of this aspect of BLM's environmental analysis. As BLM has outlined in its Answer, at 17-18, this key-loan/checkout system does not constitute a "major federal action" which would result in significant impacts to the environment. Access for the private landowners would not be denied, but only the manner of access would be changed. Thus, taking into consideration the limited impacts this action will have and guided by a rule of reason, we find that BLM's environmental conclusions are justified in this matter. We further find, based on the record before us, that appellant has failed to demonstrate error, factual or legal, in the decision appealed.

To the extent not specifically addressed herein, other issues raised by appellants on appeal have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed in part and the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge